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DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING, CONVERSION AND REPAIR, USN
NAVAL STATION, BOX 119
SAN DIEGO, CALIFORNIA 92136-5119

IN REPLY REFER TO

5090

Ser 130/ 5

15 NOV 1985

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Gary Stephany
Chief, Division of Environmental
Health Protection
County of San Diego
Department of Health Services
1700 Pacific Highway
San Diego, California 92101

Dear Sir:

On 4 November 1985, the Supervisor of Shipbuilding, Conversion and Repair, USN, San Diego, received a Notice of Violation from your office. Pursuant to a contract with the Navy, Southwest Marine, Inc. had removed asbestos waste from two Navy ships at the Southwest Marine facility. The Notice asserts that the Navy is in violation for "failure to manifest the asbestos waste as the legal generator."

The Navy objects to the Notice of Violation for two reasons. First, the County of San Diego does not have authority to regulate the Navy with respect to asbestos disposal. Section 6001 of the Resource Conservation and Recovery Act (RCRA) states that federal agencies shall be subject to state and local requirements respecting "control and abatement" of hazardous waste disposal. However, it is the Government's position that the waiver of sovereign immunity does not extend to regulations respecting waste such as asbestos, which is not listed as a hazardous waste in the federal regulations.

The Government's strict interpretation of RCRA is in accord with the general rule that statutes in derogation of sovereignty are to be strictly interpreted.

The second basis for objection is that the Navy is not the generator of the hazardous waste under California law. Rather the contractor, Southwest Marine, is the generator of the asbestos waste.

The California Hazardous Waste Control Act defines "producer" as any person who generates a waste material. (Section 25120). Although the Act does not define generation or generator, the California Hazardous Waste Management Regulations do define "generator" as "any person, by site, whose act or process produces hazardous waste identified or listed in Article 9 or 11 of this

chapter or whose act first causes a hazardous waste to become subject to regulation." (Section 66078). This definition is almost identical to that in the federal regulations.

In the present situation, Southwest Marine generated the asbestos waste as a result of a contract with the Navy. The asbestos did not become a hazardous waste until it was cut and removed. Up to that point, it was not a "waste", but was serving a useful purpose as insulation. The California Hazardous Waste Control Act defines waste to include "any material for which no use or reuse is intended and which is to be discarded." (Section 25122). Thus, only after it was removed did the asbestos become waste. In addition, asbestos generally is not a hazardous waste (as defined in Section 25117 of the Act) until it is removed from an enclosed or sealed location and exposure to it becomes possible. Southwest Marine, therefore, was the "person" (defined to include corporations in Section 25118) whose act (of asbestos removal) produced the hazardous waste or whose act first caused the asbestos to become subject to regulation.

A useful analogy to the present situation exists when a private automobile owner contracts to have work performed on his automobile. If the contractor generates any hazardous waste during the course of the repairs, the contractor (and not the automobile owner) would be deemed the generator of that waste. Moreover, the contractor would be in the better position to assume and perform the duties of a generator with respect to satisfying the information requirements of the manifest. According to the California Hazardous Waste Management Regulations, such information includes a description of the waste and the total quantity of each hazardous waste by units of weight or volume. (Section 66482). Similarly, Southwest Marine, under contract to perform asbestos removal, is clearly in a better position to complete the manifest as the generator of the asbestos waste than is the Navy.

Therefore, since the County of San Diego has no authority to regulate the Navy with respect to asbestos in this manner and since the Navy is not the generator, the Navy will not sign and complete the generator's manifest.

Sincerely,



MICHAEL A. REILLY
Counsel

By Direction of the
Supervisor of Shipbuilding,

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PWC MANIFESTING OF TRUCKS FOR SUPSHIP CONTRACTORS

1. Trucks intended for hauling hazardous waste from 32nd Street Naval Station will enter and exit via Gate 9 only.
2. Trucks will then proceed to Building 398 to ensure that they are empty and have a hazardous waste hauler sticker issued by the State of California. If trucks do not meet requirements, the truck will be denied access to the Naval Station (NAVSTA).
3. Trucks meeting all requirements will be issued an inspection pass which can be checked by Security or spot checked by PWC. The pass will state only that the truck has been inspected by PWC.
4. When trucks are full, the driver will return to Building 398 and PWC will inspect the truck for leaks and take a sample of the material. Trucks that are leaking will not obtain a manifest and will not be allowed to leave until the problem is corrected by the contractor.
5. Trucks in compliance with the state and federal laws will be manifested and a pass issued. The pass will state "manifested by PWC" and will be presented to the Guard at Gate 9 upon departure.
6. PWC will retain authority on the disposition of material.
7. PWC's period of operation will be 16.5 hours a day, 7 days a week (0730-2400). Between 2400 and 0730, emergency calls will go thru the Utilities Duty Desk, 235-2651.